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# Informal Methods of Enhancing the Accountability of Lawyers

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# INFORMAL METHODS OF ENHANCING THE ACCOUNTABILITY OF LAWYERS

W. BRADLEY WENDEL\*

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## I. INTRODUCTION

One of the themes of this conference is that we, as lawyers, judges, educators, and concerned citizens, need to take a hard look at institutional responses to perceived problems with lawyers' conduct, such as incivility, abusive practices, greed; the poor public image of lawyers; neglect of distributive justice and access issues; and so on. As it stands, we are not sure what is working among the diverse responses that have been implemented, and what is likely to work among the multifarious proposals to enhance the accountability of lawyers for misbehavior. Although we lack much empirical data, one consistent intuition of the legal profession critics is that legal regulatory institutions, such as courts and state bar associations, are not well-positioned to play a leading role in reform. Judges dislike being bogged down in satellite litigation over sanctions motions and are rightly suspicious of the tactical misuse of procedural rules, such as Rule 11 and the discovery-abuse provisions, designed to curb the excesses of partisan advocacy. State bar investigatory personnel and

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grievance committees are woefully underfunded and must concentrate their limited resources on egregious wrongdoing such as embezzling client funds. Legislatures and administrative agencies are thought to be subject to capture by the industry they regulate—here, the legal profession—although a sufficiently urgent need for reform may prompt changes in the law, as the case of the Sarbanes-Oxley statute and the accompanying SEC regulations show.<sup>1</sup> In general, though, there appears to be a persistent sense that legal institutions are not doing a very good job and may not be expected to perform well at responding to the need for reform.

This apparent fecklessness in formal regulatory responses has resulted in a great deal of pressure on the concept of professionalism as an aspiration.<sup>2</sup> Reformers urge law schools to do a better job at inculcating the appropriate attitudes or dispositions in their students. Some local bar associations adopt “creeds” of professionalism and oaths to administer to lawyers, and bar leaders, judges, and academics issue an endless stream of articles aimed at winning the hearts and minds of lawyers. The premise of this sort of response is that professionalism represents more than a bare minimum of compliance with rules. Rather, lawyers should be guided by ideals that may not be susceptible to being embodied in enforceable disciplinary codes.<sup>3</sup> There is a deep irony, then, to the call for enhancing the “accountability” of lawyers for falling short by this measure of professionalism. If the quality in question is an aspiration and not a minimum, then by definition lawyers cannot fail to attain it. We may urge lawyers on toward greater heights of professionalism, but it is a contradiction to speak of holding lawyers accountable for failing to do something that is, after all, supposed to be above and beyond a “mere” duty.

The calls for enhancing accountability suggest that reformers are less interested in professionalism as an aspiration than professionalism as a concept that is equivalent to normatively appropriate regulation of

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1. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

2. See e.g., CHIEF JUSTICE’S COMM’N ON PROFESSIONALISM, HOW CAN PROFESSIONALISM BE INSTITUTIONALIZED? THE GEORGIA EXPERIENCE 8-13 (2002), available at <http://www.garbar.org/cjpcpreed.asp#creed> [hereinafter GA. COMM’N REP.] (presenting an Aspirational Statement on Professionalism). I will cite to the bound printed version.

3. See *id.* at 55. The report distinguishes “ethics,” a minimum standard of behavior established by state bar disciplinary rules and other norms embodied in the law governing lawyers, and “professionalism,” which it understands as consisting primarily of aspirational standards which are nevertheless “expected” of lawyers. *Id.* In philosophical terms, professionalism consists of those actions that are supererogatory—that is, morally praiseworthy but not required by a moral obligation.

lawyers' activities. In other words, the fundamental question of professionalism is where the line should be located between permissible and prohibited conduct. I will have more to say about this theme in a post-conference reflections essay.<sup>4</sup> For the purposes of this constructive proposal, let us assume that we have reached some consensus on how the line should be drawn. Suppose we have concluded that lawyers in civil litigation should be deterred from conduct such as filing motions with quick turnaround times solely to harass opposing counsel, who is known to have a scheduling conflict; refusing to stipulate to facts that are not in serious dispute; grandstanding and posturing in depositions; being unfairly evasive in response to legitimate discovery requests; or using procedural devices solely for the purpose of delay. There are similar lines to be drawn in transactional and criminal litigation matters, but the point is first to clarify what constitutes unprofessional behavior.

If we are relatively clear on the boundary between appropriate and inappropriate conduct, the natural follow-up question is how best to calibrate a regime of sanctions to deter wrongful actions without over-detering or creating a chilling effect on legitimate activities, such as vigorous advocacy in support of a client with a just, but legally disfavored, position. One possibility is to rely on legal sanctions, imposed either by the profession itself, through the organized bar's grievance and disciplinary process, or by courts, legislatures, or administrative agencies. As mentioned previously, legal sanctions have some of the following well-known structural flaws: in order to satisfy due process concerns, they must be based on articulated rules, which may be over-inclusive or under-inclusive with respect to the harm that the rules seek to prevent; it is difficult to specify in advance all the circumstances in which sanctions would be appropriate; the rules on which the sanctions are based are subject to manipulation or "gaming" by adversaries; legal sanctions can be expensive and time-consuming to invoke, so that an aggrieved individual may decide that the cost of obtaining relief exceeds the benefit provided by the remedy; and from the standpoint of the legal institution that imposes the sanction, providing relief may create substantial administrative burdens.

As it turns out, formal legal sanctions are not the only method of professional self-regulation employed by lawyers. A great deal of unethical conduct is actually controlled by informal, nonlegal sanctions—penalties imposed by lawyers on each other, acting outside

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4. W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S.C. L. REV. 1027 (2003).

the scope of official legal processes.<sup>5</sup> The key to the functioning of nonlegal sanctions mechanisms is the value of a lawyer's reputation. Unless a lawyer is a one-shot player with respect to other lawyers and courts, she cares very much about acquiring a reputation for cooperativeness, trustworthiness, and reasonableness. A repeat-player lawyer with a contrary reputation faces numerous costly obstacles, such as the refusal by other lawyers to agree to reasonable schedule changes, the need to memorialize every agreement in writing, and difficulty making credible commitments. In litigation contexts, judges may give less credence to a representation made by a lawyer who is known to be untrustworthy. In transactional work, parties to a deal may demand more expensive and time-consuming due-diligence procedures when entering into a transaction with a party represented by a lawyer who has a poor reputation. Many lawyers also depend on referrals of business from other lawyers, and someone with a bad reputation would be disadvantaged if other lawyers stopped sending clients to her. Thus, for purely self-interested reasons, a repeat-player lawyer has incentives to follow the community's prevailing norms of ethics and etiquette.<sup>6</sup>

Two recent articles in the *ABA Journal* provide some anecdotal evidence for these claims. The subjects of the articles are lawyers who practice in Charleston, South Carolina,<sup>7</sup> and in municipal courts in Chicago.<sup>8</sup> Although the settings seem different—a medium-sized, relatively homogeneous city in the South and a much larger and more diverse city in the Upper Midwest—the lawyers profiled in the articles share the quality of being repeat players with respect to each other and

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5. I have written about this subject at greater length in W. Bradley Wendel, *Busting the Professional Trust: Comment on William Simon's Ladd Lecture*, 30 FLA. ST. U. L. REV. (forthcoming 2003); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001); and W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to do with Civil Discovery Practice?*, 71 FORDHAM L. REV. (forthcoming 2003).

6. The terminology of one-shot and repeat-player is drawn from the well-known article by Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974). Similar terms are used in game theory to capture the idea that a player's strategic situation is different if he anticipates future interactions with the same player—it might be rational to defect in a game played only once, because the opponent would not have a chance to retaliate, but it might be rational to cooperate in a repeated game, because of the desire to avoid retaliation by the opponent in a subsequent round. See generally DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 159-87 (1994) (applying the game theory and associated behavior to the law).

7. Margaret Graham Tebo, *Law in the Low Country*, A.B.A. J., Sept. 2001, at 40.

8. Stephanie Francis Cahill, *Motion Warriors*, A.B.A. J., Nov. 2002, at 28.

the judges before whom they practice. Lawyers in Charleston generally know each other personally, which is not surprising given the size of the legal community,<sup>9</sup> while in Chicago municipal courts, the lawyers “all seem to know one another and those who staff the courthouses.”<sup>10</sup> Even in a large city, lawyers with specialized practices, such as the Chicago lawyers who handle only drunk-driving or eviction cases, can form subcommunities which serve as information-sharing mechanisms among lawyers, judges, and courthouse personnel. Both sets of lawyers are geographically concentrated—the Charleston lawyers are near the county courthouse and the intersection of Broad and Meeting Streets, where a number of lawyers have their offices,<sup>11</sup> and the Chicago lawyers are in the Richard J. Daley civil courts building or in the criminal division courthouse.<sup>12</sup> The lawyers gossip among themselves and share information about which other lawyers can be trusted.

As a result of the relatively small number of lawyers in the relevant subcommunities, physical proximity to one another, and repeat dealings among counsel, these groups of lawyers are able to exercise effective control over unprofessional conduct, without resorting to formal legal mechanisms. Although there may be some need for enhanced judicial enforcement of existing rules against deception, for example,<sup>13</sup> in geographically concentrated, relatively small communities of lawyers, there are already enforcement mechanisms that ensure that a lawyer’s word is her bond. In Robert Putnam’s terms, repeated interactions among the lawyers build up a stock of “social capital,”<sup>14</sup> which facilitates cooperation and fairness in what would otherwise be an amoral marketplace. Social capital can be specific to two interacting parties, or it can be generalized, so that norms of cooperativeness and honesty are diffused throughout the entire community.<sup>15</sup> A community characterized by this kind of generalized expectation of good behavior is one whose members deserve the label “professionals.”

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9. Tebo, *supra* note 7, at 42.

10. Cahill, *supra* note 8, at 28.

11. Tebo, *supra* note 7, at 40.

12. Cahill, *supra* note 8, at 28.

13. W. William Hodes, *Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative*, 53 S.C. L. REV. 527, 535-36 (2002).

14. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000).

15. *Id.* at 21-22.

## II. NONLEGAL REGULATION IN PRACTICE

I am interested in the process by which communities enhance social capital by using decentralized mechanisms, outside the control of legal institutions, to control undesirable behavior. Although the *ABA Journal* articles do not specifically mention sociological concepts like social capital, or economic concepts like gatekeepers and reputational intermediaries, the stories they relate are evidence for the effectiveness of control mechanisms that rely on reputation, trust, and reciprocity. Some common themes emerge from the description of the bars in Charleston and Chicago.

A. *Credibility Is a Valuable Asset*

In the fast-moving world of small-time civil trial practice in Chicago, there is not enough time to litigate motions on a full record, so lawyers make representations to judges about the facts of the case. One lawyer who represents landlords in eviction cases notes that he needs the trust of the court in order to be effective:

If the client says he fixed some [housing code] violations and he didn't, I get rid of the client. I don't need that . . . . When I tell the judge the repairs are done, I have to believe it, and the judge has to believe me. All you've got is your credibility.<sup>16</sup>

Presumably, a lawyer who loses this credibility will be unsuccessful at persuading a judge to grant relief, at least not without a much more extensive record. In this vein, a retired judge in Charleston reports that "he would sign any motion a lawyer brought to him. But . . . if he ever got into trouble for signing something, he would never sign anything for that lawyer again."<sup>17</sup> A lawyer with a reputation for trustworthiness practicing before this judge would have a valuable asset—credibility that enables the lawyer to get orders signed quickly, without going through costly formal procedures; on the contrary, a lawyer who lost that credibility would be disadvantaged relative to more trustworthy lawyers, because she would have to resort to cumbersome motion procedures to get the judge to sign orders. Therefore, lawyers serve as reputational intermediaries or "gatekeepers," vouching for the credibility of their clients' positions

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16. Cahill, *supra* note 8, at 31 (internal alterations omitted).

17. Tebo, *supra* note 7, at 79.

so that third parties and courts are not required to take redundant precautions to ensure against being cheated.<sup>18</sup> In theory, a lawyer has an interest in preserving her reputation for probity and would be unwilling to squander this valuable asset to help one unscrupulous client, as the short-term gain from that single representation would be outweighed by the long-term reputational loss.

Lawyers sometimes assert that there is no upside to being ethical, professional, civil, or trustworthy. Unethical behavior is unlikely to be detected and punished, so the risk of behaving unethically is low, in terms of legal sanctions. At the same time, the cost of conforming one's conduct to professional norms is high because clients are allegedly seeking "attack dog" lawyers.<sup>19</sup> However, the vignettes of lawyers in repeat-player communities belie these claims. Uninformed clients may seek attack dog lawyers, but it would be an unwise strategy. Attack dogs enjoy less flexibility and presumptive credibility from adversaries and judges, leading to increased expenses associated with complying with formal procedures. Therefore, lawyers who are known to be trustworthy and cooperative have something valuable to sell to clients—the reduction of transaction costs associated with using less costly informal procedures, which depend on the parties' cooperation, instead of more elaborate formal procedures in which breaches are punished by judicially enforced sanctions.

### *B. Small, Concentrated Communities Facilitate Inexpensive Sharing of Information*

As sociologist Robert Putnam notes, cultivating social capital and trust in a complex society requires a network of social ties, which in turn facilitates gossip and information-sharing.<sup>20</sup> Lawyers who know each other and talk frequently can communicate information about others' tendencies either to cooperate with opposing lawyers or to

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18. See e.g., Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984) (discussing the concept of gatekeepers in corporate transactions).

19. Robert L. Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773, 778, 792 (1998).

20. PUTNAM, *supra* note 14, at 21. Similarly, Lisa Bernstein observed that "geographical concentration, ethnic homogeneity, and repeat dealing may be necessary preconditions to the emergence of a contractual regime based on reputation bonds." Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 140 (1992).



defect from cooperative arrangements.<sup>21</sup> Although one frequently encounters observations about how large and impersonal the community of practicing lawyers has become, there are ways to facilitate social ties even within large professional communities. The Charleston Bar maintains genteel traditions such as monthly lunches organized by a senior member of the community, at which the lawyers swap stories and pass along local traditions.<sup>22</sup> But even in the much larger market of Chicago, lawyers spend a lot of time chatting with other lawyers or courthouse personnel between appearances.<sup>23</sup> Even the bar in a large metropolitan community can be personalized to some extent if it is divided into specialized subcommunities, like the landlord-tenant lawyers described in the *ABA Journal* article.<sup>24</sup> Within these subcommunities, information-sharing mechanisms like lunches and hallway "chit-chat" can flourish.

Still, there are limits to how large and diffuse a community can become before informal information-sharing mechanisms break down. Lawyers whose practices are national in scope may not have effective means of ascertaining the reputations of local practitioners and judges in all the communities in which they practice. (The same informational asymmetry affects the local lawyers as well, who cannot easily find out whether the new lawyer on the scene is trustworthy.) One underappreciated argument against relaxing restraints on multi-jurisdictional practice is that it tends to weaken informal controls on lawyers' behavior. To the extent the practice of law is strongly localized, unethical behavior by lawyers can be addressed by nonlegal sanctions, such as information-sharing among the community of lawyers, and the subsequent imposition of costs by other members of the community. As the practice of law becomes increasingly national, and lawyers are increasingly one-shot players with respect to one another and courts, these sanctions lose their effectiveness and the

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21. See WALTER BENNETT, *THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION* 79-80 (2001) (presenting stories by lawyers recounting when the bar in large cities was much smaller, and lawyers knew something about each other).

22. Tebo, *supra* note 7, at 43. The Georgia Chief Justice's Commission on Professionalism recommends instituting "programs to honor colleagues adhering to high professional standards," informal local professionalism committees, CLE's, and mentoring programs, all of which would have the function of promulgating didactic stories about the ethics of local lawyers. See GA. COMM'N REP., *supra* note 2, at 25-26, 15-20. The report notes that "[b]uilding a community among the lawyers of this state is a specific goal" of the requirement that all lawyers attend one hour per year of professionalism CLE. *Id.* at 26.

23. Cahill, *supra* note 8, at 31-32.

24. *Id.*

profession is left with more costly legal remedies as the only response to perceived unethical conduct.<sup>25</sup>

There are ways that the information-sharing function of communities can be strengthened, even as they grow larger in scope. One of the most effective is to encourage the development of an active trade press, reporting in detail on what lawyers do. In the notorious Fisons Corporation discovery-abuse case,<sup>26</sup> the law firm was probably damaged more by an article in the *American Lawyer* entitled *Sleazy in Seattle*<sup>27</sup> than by the court-imposed sanctions. In addition, judges should be more aware of the importance of reputation and should identify unethical conduct in opinions, particularly if it is one factor in the court's decision. In a story from an Oklahoma trial court that I frequently cite, a lawyer breached an oral promise to modify a discovery schedule, and when he realized that he could create trouble for his adversary, he insisted on holding to the written schedule. The other lawyer made a motion to modify the schedule, which was denied because of a local rule providing that any schedule changes had to be in writing. However, at the conclusion of the motion hearing, the judge asked the prevailing lawyer to turn and face the courtroom, which was crowded with other lawyers waiting to argue motions. After the bailiff obtained the crowd's attention, the judge announced,

"I just want everyone to know how Mr. X practices law. He orally agreed to postpone certain discovery matters, but now is before this court arguing that his word is not enforceable because the agreement wasn't in writing as required by the local court rules. Take a good look at him now so you will know who you are dealing with in the future."<sup>28</sup>

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25. A *leitmotiv* of the conference was the sanctions proceeding against Texas attorney Joe Jamail for engaging in name-calling in a deposition. See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994). Because Jamail had been admitted *pro hac vice*, the Delaware Supreme Court could not effectively sanction him, *id.* at 56, particularly because he noted, "I'd rather have a nose on my ass than go to Delaware for any reason." STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 499 (6th ed. 2002). If legal regulations cannot affect the behavior of out-of-state lawyers, it is unlikely that any community-based sanctions could deter Jamail's conduct.

26. Described in DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 86-88 (2000).

27. Stuart Taylor, Jr., *Sleazy in Seattle*, AM. LAW., Apr. 1994, available at <http://www.law.com>.

28. ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, *CASES AND MATERIALS ON THE RULES OF THE LEGAL PROFESSION* 188-89 (1996).

Finally, judges should take opportunities to remind lawyers that if they put their credibility at risk, it can have adverse consequences for their effectiveness as representatives. In a rare example of the *observable* effect of reputation on a court's decision, a district court used the lawyer's reputation for untrustworthiness as one factor to consider in imposing sanctions for discovery abuse.<sup>29</sup> The appellate court approved:

Once the district court has recognized a pattern of misbehavior on an attorney's part, the court would be blinking [sic] reality in not taking counsel's proven propensities into account. We rule, therefore, that a trial court may properly give some consideration to a lawyer's behavior in previous cases when determining whether to accept the attorney's explanation of why he failed to comply with Rule 26(e) in a current case.<sup>30</sup>

Most lawyers are probably aware that if they acquire a bad reputation, it may have some effect on their credibility before courts, but it is helpful to have a court expressly observe that it is relying on the lawyer's reputation as one factor justifying sanctions. However, it is understandable that judges shy away from referring to vague allegations about a lawyer's reputation, as trial courts risk reversal by relying on reasoning that sounds like "I know it when I see it." In the appropriate case, though, a good judicial spanking may be more effective than all the professionalism conferences in the world at educating lawyers about the consequences of unprofessional conduct.

### *C. Trustworthy Lawyers Can Make Credible Commitments*

Lawyers in Chicago and Charleston agree that members of the community with a good reputation can commit themselves to some action and opposing counsel will rely on these representations. "Here, your word is your bond," says a Charleston lawyer, "and if you tell a fellow lawyer that you're going to do something, nobody feels the need to put that in writing because you know they will do what they say."<sup>31</sup> Similarly, in the context of civil trial practice in Chicago municipal courts, "[i]f you say you're going to do something, you do

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29. *Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992). I am grateful to Angeline Purdy for this cite.

30. *Id.*

31. Tebo, *supra* note 7, at 44.

something.”<sup>32</sup> A lawyer’s word is her bond in a literal sense. Because of the importance of reputation, a lawyer who makes a commitment to another places a valuable asset—her reputation for trustworthiness—under the control of a third party.<sup>33</sup> If the lawyer making the commitment breaches the agreement, the third party can “forfeit” the bond by refusing to rely on future commitments and by spreading the word of the violation to others in the community.

The alternative to relying on the word of a fellow lawyer is the cumbersome process of memorializing commitments in writing, with an eye toward using letters as exhibits in support of a motion for relief, if the lawyer breaks an agreement. Fair or not, this style of practice is associated with large firms in big cities, and it is significant that the Charleston lawyers who extol the values of community and civility in their city stress that “[w]e don’t have big firms here.”<sup>34</sup> In reality, the problem is not with large law firms, but with one-shot participants in a legal community. One empirical study of discovery abuse revealed that lawyers perceived much less of a problem with abusive practices among “regulars,” which are

groups of lawyers (1) who are experienced and regularly practice in a few closely related substantive areas of civil litigation, e.g., antitrust and trade regulation matters; (2) who practice for the most part in the same city or limited geographic area; (3) whose work is likely to bring them into contact with one another more than occasionally; (4) who know one another or at least one another’s firms; and (5) whose practice “styles” are either similar or well known and essentially accepted by one another.<sup>35</sup>

This study shows that it is not large firms per se that create problems, but difficulties in sharing information about the dispositions of other lawyers to cooperate or engage in abusive practices.<sup>36</sup>

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32. Cahill, *supra* note 8, at 30.

33. See generally David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375, 392-94 (1990) (discussing the three types of “bonds” as nonlegal sanctions).

34. Tebo, *supra* note 7, at 42.

35. Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 240.

36. An anecdote in support: Lawyers at my large firm who worked in smaller, specialized practices like bankruptcy and maritime law reported few problems with opponents’ abusive practices. The subcommunities were just too small for being a jerk to be a viable strategy in the long-term. By contrast, the commercial litigation and

*D. Relationships Matter*

Emphasizing the importance of particular relationships seems to fly in the face of rule of law values such as impartiality and neutrality. However, in some cases, concern for the health of ongoing human relationships may motivate a person to act with greater care for the interests of others. A lawyer in Chicago cultivates good working relationships with practically everyone in the courthouse, including clerks and sheriff's deputies.<sup>37</sup> In Charleston, "relationships trump technicalities."<sup>38</sup> These statements do not show that these communities are rife with nepotism; rather, the point is that lawyers establish good working relationships over time, proving themselves to be trustworthy, and that these relationships based on trust are more important in the long-run than formal legal rules. This is certainly not a new insight; Stewart Macaulay and Ian Macneil have been making the same point for years about the relative importance of relationships and the law of contracts in commercial transactions.<sup>39</sup> But it is a useful corrective to the reflexive, often unexamined, assumption that the best remedy for perceived unethical conduct by lawyers is to emphasize the technicalities, not the relationships.

The maxim, expressed by the lawyers in Charleston, that relationships trump technicalities is reminiscent of some work in feminist ethics, which places relationships at the center of ethical responsibilities, in contrast to traditional ethical theories that prioritize abstract concepts such as rights and utility. Several scholars have urged lawyers to pay more attention to the ethic of care, as this style of reasoning has been called.<sup>40</sup> Putting aside the debate over whether

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product liability lawyers, who seldom faced the same adversary in multiple cases, reported much more unprofessional behavior by adversaries (and may have committed some themselves!).

37. Cahill, *supra* note 8, at 32.

38. Tebo, *supra* note 7, at 44.

39. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775 (2000).

40. See generally RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS* (1989) (discussing the natural feminine tendency to focus on the ethic of care); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993) (discussing how the ethic of care might alter the contours of lawyers' ethical responsibilities); Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992) (discussing that the ethic of care helps create meaningful relationships with clients and colleagues that are "rewarding and sustaining"); Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994) (describing women as male attentive to values of care,

care-based reasoning is more strongly associated with women than with men, or whether emphasizing care essentializes women with reference to the supposedly constitutive quality of nurturing, we can recognize it at least as a complementary style of reasoning that lawyers can use in ethical deliberation. And to the extent that preserving relationships is a concern of ethics, small professional communities seem well-suited to facilitating this goal. It must be said that an *excessive* concern with relationships can be an ethical failing as well. For example, a lawyer who is so worried about damaging her working relationships with other lawyers and judges may be an insufficiently committed advocate for an unpopular client. This Article will have more to say about this concern in the concluding section.

*E. Nonlegal Sanctions Can Reach Behavior That Would Be Difficult to Regulate Using Legal Sanctions*

A familiar complaint is that “unprofessional” lawyers engage in abusive practices that are not a violation of a state bar disciplinary rule or a rule of court. Perhaps these practices could never be made the occasion for discipline because of the difficulty in specifying the conduct that would trigger sanctions, or the difficulty of proving a violation to a third-party decisionmaker. Consider the following standards from a “Lawyer’s Creed of Professionalism” adopted by the American Bar Association Section of Tort and Insurance Practice:

- “In litigation proceedings I will agree to *reasonable* requests for extensions of time or for waiver of procedural formalities [e.g. service] when the *legitimate* interests of my client will not be adversely affected.” Standard B(3).
- “I will refrain from engaging in *excessive and abusive* discovery, and I will comply with all *reasonable* discovery requests.” Standard B(6).
- “In depositions and other proceedings, and in negotiations, I will conduct myself with *dignity*, avoid making *groundless* objections and refrain from engaging in acts of *rudeness and disrespect*.” Standard B(8).

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connection, and context); Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, in LEGAL ETHICS AND LEGAL PRACTICE: CONTEMPORARY ISSUES 25 (Stephen Parker & Charles Sampford eds., 1995) (discussing the female ethic of care which focuses on people and the substance of problems).

- “I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will *unfairly* limit the other party’s opportunity to respond.” Standard B(9).
- “In civil matters, I will stipulate to facts as to which there is no *genuine* dispute.” Standard C(9).<sup>41</sup>

In each of these cases, it would be expensive and time-consuming to establish a violation in a formal legal proceeding. In economic terms, the violation of one of these standards is not *verifiable*, in the sense that from an *ex ante* perspective reasonable parties would find it not worthwhile to try to prove the violation to a third party in the event of a dispute.<sup>42</sup> There are good, due-process related reasons why a judge may not be able to impose sanctions on the basis of a perception that discovery requests are “abusive” or the refusal to stipulate to facts that are not “genuinely” in dispute. At the very least, it would be expensive and time-consuming for the judge to review the record leading up to the dispute and issue an order that was justified in principled terms. For this reason, many judges simply refuse to intervene in discovery fights or rule on motions for sanctions based on anything but the most egregious misconduct.<sup>43</sup> Although they may not be able to prove it to a third party decision-maker, the parties in an ongoing professional relationship would know when another party is engaging in gratuitous rudeness in a deposition, serving abusive discovery requests, or refusing to stipulate to facts about which there is no reasonable dispute. Thus, they may be able to respond to this kind of misbehavior using nonlegal sanctions, such as withholding future cooperation and refusing to be flexible in future scheduling. In this way, nonlegal sanctions fill a void left by the inability of legal authorities to respond to certain kinds of misconduct and thereby enhance deterrence of unprofessional behavior by lawyers.<sup>44</sup>

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41. A.B.A. Section of Tort and Ins. Practice, Lawyer’s Creed on Professionalism (Annual Meeting 1988), reprinted in A.B.A. COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 366-68 (2001) (emphasis added).

42. Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1760 (2001).

43. See John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 561-65 (2000).

44. The Georgia Chief Justice’s Commission recommends “the informal use of peer influence to alter unprofessional conduct,” particularly with regard to breaches of professional norms that would be difficult to enforce through formal means, such as showing “inappropriate respect or deference,” engaging in abusive discovery practices, and exhibiting incivility or bias. GA. COMM’N REP., *supra* note 2, at 39-40.

## III. SOME RESERVATIONS ABOUT NONLEGAL SANCTIONS

It is important to end this brief Essay with some cautionary notes. Informal, community-based, reputation-driven sanctions are not a panacea. In fact, there are some structural problems with relying too heavily on nonlegal regulation. For one thing, communities exist only by drawing boundaries separating insiders and outsiders, and there is a serious risk that the community's norms, which are enforced by nonlegal sanctions, might be biased in favor of insiders.<sup>45</sup> In a homogeneous community, such as the elite tier of corporate practitioners in a larger market, it may be appropriate to speak of shared values, networks of relationships, free sharing of information, and other preconditions to flourishing regimes of nonlegal regulation. However, these shared values might not be the values we should cultivate among lawyers. As historian Jerold Auerbach and others have observed, bar leaders have often been virulently anti-immigrant, calling for professional reforms that were transparently designed to keep bar membership confined to the WASP elite.<sup>46</sup> Words like "morally unfit" were used as code words for "foreign born,"<sup>47</sup> and the overriding concern of the bar was to keep out immigrant lawyers who espoused the "wrong" values, such as socialism. Similarly, the bar decried "ambulance chasing" by lawyers who sought to challenge the structural immunity enjoyed by industrial corporations, particularly railroads, from liability for accidental injuries or deaths among workers.<sup>48</sup> Significantly, the attack on plaintiffs' lawyers was couched in terms of moral character and the undesirability of diversifying the community of lawyers who, presumably, were all of the same mind about liability for workplace injuries. And, of course, much of the elite bar was notoriously apathetic to the problems of segregation, racism, and racial inequality.<sup>49</sup> I am not claiming that communities always cultivate pernicious values and invidious insider-outsider distinctions, but it is certainly *possible* that a community's values are ones that ought to be rooted out, not celebrated.

To put the point another way, sometimes vindicating justice requires a disruption in the existing patterns of relationships.<sup>50</sup> The

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45. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 42-44 (1976).

46. *Id.* at 52, 119-24, 130-33.

47. *Id.* at 123.

48. *Id.* at 48-51.

49. *Id.* at 263-67.

50. See Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625 (1988).



*ABA Journal* article on Charleston quotes an African-American lawyer who observes that “white and black lawyers make efforts to reach out to one another,”<sup>51</sup> suggesting the reporter’s sensitivity to the obvious criticism of relying on community values in a Southern city. One could imagine that black lawyers would not have been welcomed with open arms by the white establishment,<sup>52</sup> just as the native-born population of lawyers in the 1920s fought mightily to keep out immigrants from Central and Southern Europe. The civil rights movement was a profoundly destabilizing period in history when patterns of social and commercial relationships were upset by the struggle for equality. Lawyers who were unduly concerned with maintaining good relationships with others in the same geographic community would not have been as effective as those who were willing to challenge the existing structures of hierarchy and exclusion. Again, this is not to say that professional communities cannot form across racial and ethnic lines, but the history of the professionalism movement related by Auerbach should inspire some caution about over-relying on community-based regulation.<sup>53</sup>

The comment by the Charleston lawyer that “relationships trump technicalities” is encouraging, as long as “technicalities” are understood to mean the sorts of procedural maneuvering that lawyers use *unfairly* to bog down cases. However, it is well to keep in mind that one person’s loophole may be another’s constitutional right. One persistent theme of the public’s criticism of lawyers, particularly those who represent criminal defendants, is that they get their clients off on technicalities. If the technicality in question is the right against self-incrimination or the right to be free from unlawful searches and seizures, the lawyer in question would actually be acting to vindicate a fundamental liberty interest of the client. This is a familiar debate, but from time to time powerful lawyers tend to forget about the constitutional significance of the technicalities employed by lawyers. In 1946, Attorney General Tom Clark gave an address denouncing “revolutionary” lawyers who “use[] every device in the legal category to further the interests of those who would destroy our government.”<sup>54</sup> He suggested that the organized bar take these lawyers to the

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51. Tebo, *supra* note 7, at 44.

52. In Charleston in the 1940s, in fact, the professional and social community ostracized a federal judge who had ruled in favor of the plaintiffs in a civil rights case. The judge had formerly been a member of the city’s social elite. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 366 (1975).

53. See generally AUERBACH, *supra* note 45 (providing the history of the professionalism evolution).

54. *Id.* at 233.

woodshed for “a definite and well-deserved admonition,”<sup>55</sup> but given the anti-Communist hysteria of the time, it is a fair assumption that the unorganized bar—the professional communities in which these lawyers practiced—would have already done some “woodshedding” of their own.

On a smaller scale, just as there are structural problems inherent in legal regulation, there are structural problems inherent in nonlegal regulation. A well known analysis of one of these problems is sociologist Abraham Blumberg’s provocatively titled article about criminal defense lawyers, *The Practice of Law as Confidence Game*.<sup>56</sup> Blumberg’s insight is that repeat-player defense lawyers, who deal regularly with prosecutors, judges, and courthouse personnel, owe divided loyalties—first to the other repeat-players with whom they interact on a repeat basis and only secondarily to their clients.<sup>57</sup> There are many cases in which a lawyer could take some action that would be beneficial to the client, such as insisting on going to trial instead of accepting a plea bargain, but which would anger one of the other repeat-players. For example, judges depend on plea bargains to keep their dockets manageable and may regard defense lawyers who insist on trials as obstructionist. The dilemma for the defense lawyer is that if she does not maintain good working relationships with other courthouse regulars, she will not be as effective in the future on behalf of other clients. So the lawyer faces the prospect of “selling out” the present client to further the interests of an undefined set of future clients. The dilemma only arises because of the possibility of informal sanctions against the defense lawyer—prosecutors being uncooperative in the future, judges giving short shrift to requests for relief, and so on. Then, in some ways, the concern for reputation that arises naturally in small communities of practitioners may lead lawyers to be less effective as they could be on behalf of particular clients, although it is arguable that they are more effective in the long term.<sup>58</sup>

I will conclude, as I have before, with the modest argument that legal and nonlegal sanctions are complementary methods of enhancing the accountability of lawyers, not exclusive means of regulation. Nonlegal sanctions are particularly effective where a violation of a norm would be costly to prove to a third-party decisionmaker—as in

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55. *Id.*

56. Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC’Y REV. 15 (1967).

57. *Id.* at 20; see also Galanter, *supra* note 6, at 117-18.

58. See generally DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE (1990) (providing a detailed look at how law is practiced in a rural setting).

cases where the judgment of a violation is a highly contextual, fact-specific one, or depends on impressionistic information. In industries with flourishing regimes of nonlegal regulation, such as the diamond and cotton trade associations described by Lisa Bernstein,<sup>59</sup> there are numerous judgments that must be made about a party's good faith in dealing judged against a backdrop of highly volatile markets and subjective evaluations of the quality of the goods being traded. Many instances of litigation misconduct are similar to breaches of norms of good faith dealing in the cotton or diamond industries, because describing them as "misconduct" requires an assessment of the actor's motivation, past behavior, and any possible legitimate reasons for the action in the context of a detailed record. Lawyers recognize the difficulty in specifying grounds for their judgments that others have engaged in misconduct. As one of the reporters of an ABA study on discovery abuse wrote: "The answer to almost every question [about discovery practices] is 'it depends.' Aggressiveness generally is inappropriate, unless the war was initiated by the other side. Hardball is inappropriate unless there is a specter of mischievous plaintiffs' lawyers waiting to use the information from discovery in other suits."<sup>60</sup> The significant thing about this comment is not that lawyers cannot recognize discovery abuse when they see it, but that they cannot *establish* it, under generally applicable criteria specified in advance. In such a case, we might expect unprofessional behavior to go unchecked in the absence of some kind of nonlegal sanctions for misconduct. However, if the *ABA Journal* articles on Chicago and Charleston establish anything,<sup>61</sup> it is that some professional communities get by pretty well without the kinds of abusive practices that are the basis for professionalism horror stories told at conferences like this one.

As Deborah Rhode has frequently observed, the professionalism movement is hampered by a lack of empirical support for the claims that there is a problem and that there is an effective way to do something about it.<sup>62</sup> I am not claiming that a few anecdotes about harmonious communities of lawyers provide decisive evidence in favor of letting communities regulate themselves.<sup>63</sup> But they do, at

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59. See Bernstein, *supra* note 42 (discussing the cotton industry); Bernstein, *supra* note 20 (discussing the diamond industry).

60. Nelson, *supra* note 19, at 780.

61. Tebo, *supra* note 7; Cahill, *supra* note 8.

62. Deborah L. Rhode, *Defining the Challenges of Professionalism: Access to Law and Accountability of Lawyers*, 54 S.C. L. REV. 889 (2003).

63. There are apparently many more anecdotes. Here is a statement from the National Conference of Bar President's Professional Reform Initiative: "It does appear that in areas where the bar and judiciary are smaller and where lawyers and judges tend to know each other,

least, suggest ways in which the response to the perceived crisis in professionalism, and the need for enhanced accountability for lawyers is not necessarily a role only for judges, bar grievance personnel, rules committees, legislatures, and other legal authorities. Under certain conditions, if there is a problem with unprofessional conduct, lawyers themselves might not do a bad job redressing it.

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problems related to honesty and truthfulness are not so frequently experienced as in areas which have thousands of lawyers and hundreds of judges.” Professional Reform Initiative, Introduction, *The Professional Reform Initiative's First Project: Increasing Public Trust and Confidence in the Justice System by Emphasizing Truthfulness and Honesty as the Lawyers' Stock-in-Trade*, available at <http://www.cobar.org/DOCS/PRI%20Project.pdf>. (last visited Feb. 15, 2003).